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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, SAN FRANCISCO BULK MAIL CENTER, RICHMOND, CALIFORNIA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Where a labor arbitration case raises issues of Federal law and public policy, may a reviewing court vacate the arbitrator's award and substitute its own judgment of the merits of the dispute on the ground that the arbitrator did not apply the law as interpreted by the court?

2. Where a labor arbitration award is open to a construction that would render its enforcement permissible under Federal law, may a reviewing court nevertheless construe it as impermissible without engaging in its own de novo review of the law and facts?

3. Does the statute providing that Federal employees who participate in a strike against the Government "may not accept or hold a position in the Government" deprive Federal agencies of the discretion to impose sanctions other than discharge against striking employees?

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UNITED STATES POSTAL SERVICE, SAN FRANCISCO BULK MAIL CENTER, RICHMOND, CALIFORNIA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The American Postal Workers Union, AFL-CIO (APWU) petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit affirming the decision of the District Court is reported at 682 F.2d 1280 (1982) and is reproduced at pages 1a-14a of the Appendix to this Petition ("A."). The Order of the United States District Court for the Northern District of California denying enforcement and vacating the award of Arbitrator William Rentfro appears at pages 15a-16a of the Appendix. The Award of the Arbitrator appears at pages 17a-21a of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on June 8, 1982. By an order entered August 31, 1982, Mr. Justice Rehnquist granted APWU an extension of time, until September 30, 1982, within which to file this Petition.

STATUTES INVOLVED

This case involves section 1208(b) of the Postal Reorganization Act (39 U.S.C. § 1208(b)), and section 7311 of Title 5 of the United States Code (5 U.S.C. § 7311). Section 1208(b) of Title 39, which is modeled after section 301(a) of the Labor Management Relations Act of 1947 (29 U.S.C. 185(a)), provides:

> (b) Suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy.[1]

Section 7311 of Title 5 provides, in pertinent part:

> An individual may not accept or hold a position in the Government of the United States, . . . if he—
>
> > (3) participates in a strike, or asserts the right to strike against the Government of the United States or the government of the District of Columbia; . . .

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[1] Section 185(a) of Title 29 provides:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

A. The 1978 Labor Dispute And The Actions of the Discharged Employee

The petitioner APWU is the recognized collective bargaining representative of over 300,000 Postal Service employees. The grievant, Michael Murphy, was a member of the APWU and a Postal Service employee. He was first hired on August 27, 1977. He was transferred to the San Francisco Bulk Mail Center in June of 1978 and worked there until he was discharged on July 27, 1978.

Mr. Murphy was discharged for alleged strike activity. The activities in question occurred on July 22, 1978. On that day a number of Mr. Murphy's fellow employees were picketing the entrance to the Bulk Mail facility when he arrived there for work. The picketers were protesting the terms of a new collective bargaining agreement entered into between APWU and the Postal Service. (Arbitrator's Opinion) ("Arb. Op."), A. 18a).

Mr. Murphy was aware that negotiations for a new contract between APWU and the Postal Service were in progress and, in fact, the night before, had received a call informing him that there would be a strike at the facility the next day and requesting his support. He arrived at the facility the next morning an hour and fifteen minutes before starting time to investigate the situation before he made any decisions. (Id., A. 18a) Upon arrival, Mr. Murphy recognized a number of co-employees and some union officials among the picketers. He questioned them about their activities. While no picketer physically threatened him, Murphy expected verbal abuse of anyone crossing the picket line and was fearful of future reprisal. (*Id.*, A. 18a). In the words of the arbitrator whose award is at issue here, Murphy "concluded that he would not attempt to enter the facility for fear of future reprisal" (*Id.* 18a).

Murphy thereupon called the Bulk Mail Center and informed management that he was afraid to cross the picket line to report for work. After his call he engaged in picketing activities until 10:30 or 11:00 a.m. before leaving.[2]

Murphy returned to the Bulk Mail Center later that afternoon. At that time he first discovered that the strike was not sanctioned by the union leadership. Upon receipt of this information, Murphy decided that he would not offer further support for the work stoppage.

The picket line remained intact for the next few days. Murphy reported to work each of the next three days, but was unwilling to cross the picket line. He called the facility each day to inform them that he was not willing to cross the picket line and then returned home without offering support of any sort for the picketers. On July 27, 1982 he received a formal notice of termination from the Postal Service.

B. The Proceedings Before the Arbitrartor

Pursuant to the collective bargaining agreement between the APWU and the United States Postal Service an arbitration hearing was held before arbitrator William E. Rentfro on June 21, 1979. A letter award reinstating Murphy without back pay was issued on October 4, 1979. On December 31, 1979 the Arbitrator issued a formal opinion giving the rationale for his decision.

Arbitrator Rentfro first observed that he and other arbitrators had already issued "a variety of arbitral decisions concerning discharged employees" in cases arising from work stoppages at the Bulk Mail Centers in Richmond and Jersey City during the same labor dispute. (A. 20a). He then stated (*id.*):

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[2] When asked at the arbitration hearing why he had engaged in such activities, Murphy stated: "I felt safer by not crossing the line. And secondly, I was one of them because I was in their union, worked with them." (Arb. Op., A. 19a)

> The broader legal issues pertaining generally to all cases have been treated at length by this Arbitrator and others. It is fairly settled, at least among the respective arbitrators, that each case is to be evaluated on its own merits with reference to the intentions of the alleged striker, the nature and extent of his or her participation, the effects of that participation, and any unique circumstances tending to mitigation. Examination of cases on such an individualized basis necessarily involves resolutions of credibility, assessments of motive, and other factors of a highly intangible nature. (A. 20(a))

Finally, he held:

> The penalty of discharge is too severe in view of Grievant's potential for becoming a valuable Postal Service employee, and particularly in view of the destructive effect that sustaining the discharge would in all likelihood have upon his prospects for future employment. Given the mitigating circumstances present here, the Arbitrator is neither constrained nor persuaded to uphold the termination. (A. 21(a))

C. Proceedings in the District Court and Court of Appeals

The Postal Service refused to reinstate grievant Murphy, claiming that such an action would constitute a violation of a Federal law (5 U.S.C. § 7311), which provides that "An individual may not accept or hold a position in the Government of the United States" if he has participated in a strike against the United States. The APWU then brought an action in the United States District Court for the Northern District of California to enforce the arbitration award.[3] After hearing oral argument on APWU's motion for an order to show cause why the

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[3] The District Court had jurisdiction under Section 1208(b) of the Postal Reorganization Act of 1970 (39 U.S.C. 1208(b)) which is modeled after Section 301 of the LMRA of 1947, as amended, (29 U.S.C. § 185).

award should not be enforced, the court denied enforcement and vacated Arbitrator Rentfro's award. The court's Order stated:

> The Court concludes that an arbitration award which compels the performance of an illegal act cannot be enforced. *Glendale Mfg. Co. v. Local 520 ILGWU*, 283 F.2d 936 (4th Cir. 1960), cert. denied, 366 U.S. 950 (1961). The Court has therefore determined that the award herein must be vacated. *Sobel v. Hertz, Werner & Co.*, 469 F.2d 1211, 1215 (2nd Cir. 1972). (A. 15(a))

The APWU appealed the District Court's ruling to the Court of Appeals for the Ninth Circuit, which upheld the District Court. The Court of Appeals' rationale was twofold. First, according to the court, the award reinstating Murphy constituted manifest disregard for the law as interpreted by the Court—in this instance 5 U.S.C. § 7311. (A. 5a-6a). Second, the Court held that even if the Rentfro award was not so clearly contrary to law as to constitute manifest disregard for the law, reinstatement of Murphy would be illegal:

> We conclude that Murphy participated in a strike against the Postal Service. His reinstatement would violate 5 U.S.C. § 7311. That is the only conclusion which the facts of this case can support. In light of these facts, remand would be futile because . . . we could not accord judicial deference to any other conclusion by the arbitrator. (A. *8a*).

Notably, one member of the panel dissented from this ruling, on grounds that the Arbitrator's opinion did not support the majority's conclusion that Murphy participated in the strike in violation of law (A. 10a-11a). The dissenting judge stated (A. 14a):

> The majority's basic position, then, is not that the arbitrator unambiguously found Murphy to have participated in the strike, nor that a contrary conclusion would require "manifest disregard of the

law." It is, quite simply, that the majority has assumed the role of deciding whether Murphy participated in the strike, and has decided that he did. With all due respect, it is for the arbitrator, not this court, to make that decision. Consequently, I must dissent from the unwarranted and unjust disposition which the majority arrives at in this case.

REASONS FOR GRANTING THE WRIT

The decision below decides two important questions concerning the scope of judicial review of arbitration awards in cases where the awards raise issues of Federal law and public policy, and does so in a way which conflicts with this Court's decisions and with rules governing review of arbitration awards stated in other circuits. These issues are central to national labor policy, and are recurring and important.

In addition, the court below has misconstrued the federal law barring employment of persons who participate in strikes, 5 U.S.C. § 7311, to require Federal agencies to discharge any employee who can be said to have engaged in strike activity to any extent and no matter what the circumstances. The question as to whether Congress has mandated such a harsh uniform response is of crucial importance to federal employees and to the future of labor relations in the federal sector. The approach to this question delineated by the Ninth Circuit is not supported by the language of the statute and is contrary to the understanding of 5 U.S.C. § 7311 articulated by both the Second and Seventh Circuits.

1. More than twenty years after this Court explained the nature and scope of judicial review of arbitration awards in the Steelworkers Trilogy,[4] the Court of Appeals has fashioned and applied a completely different

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[4] *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960), *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

standard of review. According to the Court of Appeals, when it is arguable that a federal law bears on the matter, the arbitrator's determination is to be overturned unless that determination is the one the Court would have made in applying the statute.

In contrast, this Court has held that an arbitrator must confine his judgment to construction of the contract. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 at 597 (1960). An arbitrator who bases his decision not on the contract, but on ". . . the requirements of enacted legislation . . . exceed[s] the scope of [his] submission." *Id.*

For this reason, the Court of Appeals' concern that the arbitrator did not show proper regard for the law is misplaced. Unless directed to do so by the contract, an arbitrator is not permitted to base an award on a construction of law. While he may look to the law for guidance, ". . . to determine the sense of the agreement . . .", his interpretation must be based on the contract, not the law. *Enterprise Wheel & Car Corp., supra*, at 598. In this case, apart from the Court of Appeals' concern for the proper application of 5 U.S.C. § 7311, there is no contention that the arbitrator's award does not draw its essence from the collective bargaining agreement.[5]

This Court's pronouncements on the role of labor arbitrators are plain and unequivocal.[6] In light of this, it

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[5] The contract between the APWU and the Postal Service does not incorporate or direct the arbitrator to apply 5 U.S.C. § 7311. Article 18, the No-Strike provision, states, in pertinent part:

> Section 1.
> The Unions in behalf of their members agree that they will not call or sanction a strike or slowdown.

[6] Notably, the Ninth Circuit's authority for its "manifest disregard" standard is drawn primarily from cases involving standard commercial arbitrations. *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953); *Sobel v. Hertz, Werner & Co.*, 469 F.2d 1211, 1214 (2nd

is not surprising that the rule stated by the court below is in direct conflict with the majority view in the Courts of Appeals. *E.g. Boire v. International Brotherhood of Teamsters*, 479 F.2d 778, 803 (5th Cir. 1973) ([t]he arbitrator has no obligation whatsoever to abide by the N.L.R.A. . . ."); *NLRB v. Horn & Hardhat Co.*, 439 F.2d 674, 678 (2nd Cir. 1971) (function of an arbitrator is to ". . . discern the intentions of a party to a contract . . . [t]he interests of third parties, such as an individual employee or the public, are not his primary concern.")

Nevertheless, despite the apparent clarity of the principles set forth in the trilogy and its progen y, the confusion of the court below is not unique. A petition for certiorari raising very similar issues—concerning the extent to which an arbitrator is compelled to consider Federal law in rendering a judgment on a contractual dispute—was granted June 28, 1982. *W. R. Grace & Co. v. Local Union No. 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers of America*, No. 81-1314, cert. granted, 73 L.Ed. 1365. Certiorari should be granted

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Cir. 1972); *San Martine Compania de Navegacion v. Saguenay Terminals Limited*, 293 F.2d 796, 801 (9th Cir. 1961); *Trafalgar Shipping Co. v. International Milling Co.*, 401 F.2d 568 (2nd Cir. 1968). The principle for review articulated from these cases was applied despite this Court's clear instruction that courts must distinguish between review of commercial and labor arbitration:

> . . . the run of arbitration cases, illustrated by *Wilko v. Swan*, 346 U.S. 427 becomes irrelevant to our problem. . . . In the commercial cases, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under any ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself. [*United Steelworkers v. Warrior & Gulf N. Co., supra*, 363 U.S. at 578.]

here and this case should be consolidated with No. 81-1314.

2. To be sure the Court of Appeals' did not only conclude that federal law has an impact on the matter at issue here, but that enforcement of the Rentfro award would compel the Postal Service to perform an illegal act.

However, as the Ninth Circuit had previously recognized ". . . public policy should not be turned into a facile method of substituting judicial for arbitral judgment." *Amalgamated Transit Union v. Azetc Bus Lines*, 654 F.2d 642, 643 (9th Cir. 1981), quoting Danau, *Three Problems in Labor Arbitration*, 55 Va. L. Rev. 427 (1969). Accordingly, the prevailing view in the Court of Appeals is that while the court and not the arbitrator must interpret the law, a reviewing court should avoid, if possible, interpretations of an award which make that award invalid.

Thus, for example, in direct conflict with the Ninth Circuit's approach here, the Third Circuit has deferred to an arbitrator's award denying reinstatement of a discharged employee in the fact of a claim that the award was repugnant to the NRLA so long as the conduct leading up to the discharge was "arguably unprotected." *NLRB v. Pincus Bros., Inc.-Maxwell*, 620 F.2d 367, 375 (3rd Cir. 1980). Obviously, no such deference was given Arbitrator Rentfro by the Court of Appeals. For, as is pointed out in the dissent, the arbitrator's opinion is ambiguous in a number of crucial respects and is devoid of any finding that Murphy participated in the strike. (A. 11a). Indeed, the facts are quite consistent with a conclusion that Murphy did not engage with his fellow employees in a concerted stoppage of work.[7]

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[7] Strikes are defined in the National Labor Relations Act as follows:

> "The term strike includes any strike or other concerted stoppage of work by employees (including a stoppage by reason

Even presuming that no deference at all is appropriate for a court reviewing a labor arbitration award against a claim that it contravenes the law or public policy, the Tenth Circuit has ruled that the courts are obligated to conduct a *de novo* review of the law and facts where there is a claim that the award required illegal conduct. *Communications Workers of America v. Mountain States T & T*, 102 LRRM 2161 (10th Cir. 1978); *Telephone Workers Union v. New Jersey Bell*, 45 F. Supp. 284, 296 (D.N.J. 1977), aff'd, 584 F.2d 31 (3rd Cir. 1978); *cf. Alexander v. Gardner-Denver Co., supra.* No such review occurred in the instant case—the court simply examined the arbitrator's opinion and found it repugnant to the policy against Federal employee strikes.

3. The Ninth Circuit's treatment of the arbitration award in question is predicated on its interpretation of the Federal law prohibiting strikes against the government. Murphy's reinstatement by the Postal Service would, the majority concluded, violate 5 U.S.C. § 7311. (A. 9a). Based on this judgment, enforcement was denied.

The Ninth Circuit's conclusion on this important question of Federal law is wrong. Assuming arguendo that Murphy actually did participate in a strike (a conclusion the dissenting judge regarded as unwarranted), the statute does not say that a Federal agency is *compelled* to discharge a strike participant. Indeed, the statute on its face circumscribes only the conduct of government employees, not the discretion of government agencies.

The most reasonable interpretation of 5 U.S.C. § 7311 is that it grants the Postal Service the authority to dis-

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of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees." (29 U.S.C. § 142(a).)

The arbitrator found that Murphy was intimidated by the strikers and "concluded that he would not attempt to enter the facility for fear of future reprisal" (A. 18a). In this context, the fact that Murphy briefly participated in picketing activity does not require the conclusion that he participated in the strike.

charge strikers rather than imposing on the service the obligation to make such discharges. While no Court of Appeals has previously faced this issue in the context of an arbitrator's award to reinstate a striker, other courts have held that a government agency has wide discretion in determining appropriate discipline for strike activity, and that discharge is not the only lawful response. In *United States v. Patco*, 653 F.2d 1134, 1141 (7th Cir. 1981) (holding injunction against a slowdown by air traffic controllers could be issued pursuant to 5 U.S.C. §7311), the Court noted:

> . . . the district court viewed the criminal penalty of 18 U.S.C § 1918 and the termination of employment implicit in the terms of 5 U.S.C. § 7311 as the exclusive remedies for engaging in the prohibitive conduct. We disagree with that conclusion . . . dismissing or indicting the air traffic controllers involved in the slowdown would not be a viable remedy for the Government. First, terminating a substantial number of controllers would seriously impair the FAA's ability to provide the public with this essential service; this is precisely the sort of result that the statutory provisions were intended to prevent. Second, indicting or terminating the controllers after a strike does nothing to prevent the strike and the serious consequences that would surely follow.

Similarly, in another Patco case, *United States v. Patco*, 438 F.2d 78, 82 (2nd Cir. 1970) the Court stated "[t]here is substantial question whether this statute must be read in a manner which would require the government to dismiss all controllers and thereby end air travel service until replacements could be trained." See also *Ogden v. Department of Transportation*, 430 F.2d 660 (6th Cir. 1971) and *McTiernan v. Gronouski*, 337 F.2d 31, 34 (2nd Cir. 1964). Thus, the Ninth Circuit's judgment that 5 U.S.C. § 7311 requires discharge of a striker is unsupported by the language of the statute and in conflict with the decision of other circuits.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80-4250

D.C. No. C-80-0748-WWS

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Plaintiff-Appellant,

—VS—

UNITED STATES POSTAL SERVICE,
SAN FRANCISCO BULK MAIL CENTER,
RICHMOND, CALIFORNIA,
Defendants-Appellees.

[Filed June 8, 1982]

Appeal from the United States District Court
for the Northern District of California
William W. Schwarzer, District Judge, Presiding
Argued and Submitted October 15, 1981

Before: WALLACE and PREGERSON, Circuit Judges, and BYRNE,* District Judge.

OPINION

WALLACE, Circuit Judge:

The American Postal Workers Union (the union) appeals from a district court judgment denying enforcement of an arbitration order. The district court determined that the arbitration order compelled the United

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* Honorable William Matthew Byrne, Jr., United States District Judge, Central District of California, sitting by designation.

States Postal Service (Postal Service) to perform an illegal act and was therefore unenforceable. We affirm.

I

The union brought this action on behalf of Michael Murphy (Murphy), a union member discharged by the Postal Service for participation in an illegal work stoppage. The incidents which gave rise to this action are not disputed. On Friday evening, July 21, 1978, Murphy was informed that a strike would be initiated at the bulk mail facility the following morning. The next day, Murphy arrived at the facility to investigate the situation a little over an hour before his 9:00 a.m. shift began. He observed a group with picket signs gathering and moving towards the facility's main entrance. He recognized some members of the group as co-workers and others as union officers. When he inquired about the activities, he was informed that a picket line would be established, but that no one would be prevented from crossing it. Murphy, nevertheless, anticipated that there would be threats and verbal abuse directed towards workers who crossed the line and concluded that he would not attempt to enter the facility.

He drove to a public telephone, called the bulk mail facility, and stated that he would not report for duty as he was afraid to cross the picket line. He then returned to the main gate and commenced picketing. Murphy testified before the arbitrator that he had two reasons for joining the pickets: "I felt safer by not crossing the line. And secondly, I was one of them because I was in their union, worked with them." Murphy engaged in the picketing activities until 10:30 or 11:00 a.m. He then left the facility and did not return until the afternoon. Upon his return he learned that the strike was not union sanctioned. Because of this, Murphy decided that he would not offer further direct support.

On each of the three following days, Murphy arrived at the facility prior to the start of his scheduled shift.

When, on each day, he encountered picketers, he called in to report that he was unwililng to cross the line. He then returned home without taking part in the picketing activities.

On July 27 Murphy received formal notice of his termination. Murphy testified before the arbitrator that he had observed letters distributed by the Postal Service notifying postal employees that strikes were prohibited by law. The arbitrator found that Murphy was not discharged for just cause and ordered his reinstatement with no loss of seniority rights but without back pay.

The union filed a complaint to confirm the arbitration award and secured an order to show cause why the award should not be confirmed. After a hearing, enforcement was denied and the complaint was dismissed with prejudice.

This appeal presents two questions: (1) whether the arbitrator's decision required the Postal Service to perform an illegal act, and (2) if so, whether the award is enforceable. We address the question of legality first.

II

The arbitrator's award requires the Postal Service to reinstate Murphy. By statute, a worker may not hold a government position if the individual has participated in a strike against the government. 5 U.S.C. § 7311.[1] Appropriately, the union has not challenged the right of the government to establish such conditions of hiring and

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[1] 15 U.S.C. § 7311 provides, in part:

> An individual may not accept or hold a position in the Government of the United States . . . if he—
>
> . . . .
>
> (3) participates in a strike . . . against the Government of the United States . . . .

18 U.S.C. § 1918 establishes criminal penalties for the violation of section 7311.

retention of employees. *See United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879, 882-84 (D.C.D.C.), *aff'd*, 404 U.S. 802 (1971). If Murphy engaged in a strike against the Postal Service, reinstatement would violate 5 U.S.C. § 7311 and thus be illegal. We must therefore determine whether Murphy did or did not strike.

The facts of this case are undisputed. Therefore, we need not decide what deference should be given to the arbitrator's findings of fact. It is clear that the arbitrator accepted as true Murphy's uncontroverted testimony of his involvement in the strike, including his uncoerced picketing activities. The arbitrator's conclusions, however, are less than precise. The arbitrator specifically determined that Murphy "abandoned the strike and took no further part in proscribed activities" after he learned that the strike was not sanctioned by the union. Additionally, the arbitrator stated that Murphy gave "active, but misconceived, support of the strike." The only logical inference which can be drawn from this language is that the arbitrator concluded that Murphy took *some* part in "proscribed activities" and that he participated in the strike prior to abandoning it. It is not necessary for an arbitrator to state the precise words that an employee "participates in a strike" in order to conclude that his employment would violate section 7311. The language used is sufficient.

Nevertheless, the arbitrator awarded Murphy reinstatement. An award of reinstatement seems inconsistent with the conclusion that Murphy participated in the strike. The arbitrator explained the award, however, as a mitigated penalty:

> Grievant's assertions that he acted under erroneous assumptions and that he subsequently abandoned the strike are convincing. The penalty of discharge is too severe in view of Grievant's potential for becoming a valuable Postal Service employee, and particularly in view of the destructive effect

> that sustaining the discharge would in all likelihood have upon his prospects for future employment. Given the mitigating circumstances present here, the Arbitrator is neither constrained nor persuaded to uphold termination.

In light of these statements and upon examination of the entire opinion of the arbitrator, we conclude that the award of reinstatement does not reflect any doubt in the arbitrator's mind as to whether Murphy participated in a strike. Rather, the award demonstrates the arbitrator's belief that the penalty was too severe and should be reduced. The specific award, reinstatement *without* back pay, supports our conclusion. We can conceive of no reason for which the arbitrator would have penalized Murphy had he not participated in the strike.

But even if the arbitrator's conclusions were not clear, a remand would not be appropriate in this case. Reversing the district court and remanding to the arbitrator would be futile unless, upon remand, the arbitrator could decide that Murphy did not participate in the strike and unless, if he so found, we would be required to defer to his conclusion. We hold that even if the arbitrator's conclusions were unclear and if, upon remand, he decided that Murphy did not participate in a strike, we could not defer to such a determination.

In most cases, courts must defer to an arbitrator's conclusions even where they are erroneous. *E.g.*, *San Martine Compania de Navegacion v. Saguenay Terminals Limited*, 293 F.2d 796, 801-02 (9th Cir. 1961) (*San Martine*). These cases involve conclusions of law with respect to such issues as contract interpretation, *id.* (cancellation provision and course of dealings pursuant thereto), and damages for breach, *MSP Collaborative Developers v. Fidelity and Deposit Company of Maryland*, 596 F.2d 247, 251-52 (7th Cir. 1969). When the cases and issues are of this nature, the arbitrator's conclusions simply resolve the competing interests of two opposing

private parties, and courts are bound to defer to the conclusions of the arbitrator *unless* the arbitrator has manifestly disregarded the law.

We believe that a conclusion that Murphy did not strike would constitute manifest disregard of the law. *See Wilko v. Swan*, 346 U.S. 427, 436-37 (1953); *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2d Cir. 1972); *San Martine, supra*, 293 F.2d at 801. *See also Trafalgar Shipping Co. v. International Milling Co.*, 401 F.2d 568, 572-73 (2d Cir. 1968). The facts show that Murphy understood that the picketers were on strike. While he believed the strike to be union sanctioned when, in fact, it was not, he still understood that the activity was a strike. He did not simply refuse to cross the picket line out of fear; he joined the picketers. While his participation in the picketing was short-lived, it was not non-existent. Murphy's picketing with co-workers during scheduled work hours constituted a concerted work stoppage and a strike under 5 U.S.C. § 7311. *See United Federation of Postal Clerks v. Blount, supra*, 325 F. Supp. at 884-85; *Tennessee Valley Authority v. Local No. 110 of Sheet Metal Workers Int'l Ass'n*, 233 F. Supp. 997, 1000 (W.D. Ky. 1962). We have found no authority to suggest that Congress intended the statute to cover only strikes where the striker correctly ascertains the strike leadership, only strikes which involve something more than picketing and concerted work stoppage, or only strikes of a certain duration. We therefore conclude that, should the arbitrator decide that Murphy did not participate in a strike, he would do so in manifest disregard of the law. In that case, the arbitrator's conclusions would not be entitled to the deference ordinarily accorded and would not bind this court. *See San Martine, supra*, 293 F.2d at 801.

Furthermore, even if the error would not be so clearly contrary to the law as to constitute manifest disregard of the law, we could not defer to a conclusion by the

arbitrator that Murphy did not strike and should be reinstated. This case requires more than the resolution of the competing interests of two opposing private parties. It also requires an adjudication of the coverage and application of a federal law passed by Congress to insure a stable work force for the government and agencies of the United States. We therefore cannot treat the issues raised by this dispute merely as matters of conflict between an employer and its employees. In light of the undisputed facts of this case, we could not confirm an award of arbitration simply because the arbitrator stated that Murphy did not strike. To confirm such an award in this case would be to confer upon the arbitrator unreviewable power to construe and apply section 7311. In his original decision, the arbitrator concluded that the penalty of discharge was too severe a sanction because Murphy was young, misinformed, and potentially valuable as an employee. The choice of sanctions, however, is not arbitrable; that choice has already been made by Congress. We cannot empower the arbitrator to nullify the mandates of Congress simply by stating that an individual did not strike when, as here, his actions, as presented in undisputed facts, constitute a strike for purposes of the section.

The union also argues that we should review the arbitrator's decision only by reference to an October, 1979, letter award and that we should disregard the December formal award and its accompanying opinion. The letter award merely stated that Murphy was dismissed without cause, reinstatement was required, and a full opinion would follow. In effect, the union argues that we should disregard what the arbitrator said about what happened in this case, *i.e.*, his findings with respect to Murphy's activities. We reject the union's argument. Although an arbitrator is not required to make formalized findings nor to offer reasons for his decisions, when he does so, we need not ignore them. *See United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

We conclude that Murphy participated in a strike against the Postal Service. His reinstatement would violate 5 U.S.C. § 7311. That is the only conclusion which the facts of this case can support. In light of these facts, remand would be futile because, for reasons given above, we could not accord judicial deference to any other conclusion by the arbitrator. We therefore turn to the question of enforceability.

III

Federal courts will not undertake plenary review of the merits of an arbitration award. "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, *supra*, 363 U.S. at 596. Review of arbitration awards is more limited than review of trial court decisions. An arbitrator's award will not be vacated because of erroneous findings of fact or misinterpretations of law. *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp. of Panama*, 206 F. Supp. 777 (S.D.N.Y. 1962), *aff'd*, 312 F.2d 299 (2d Cir.), *cert. denied*, 373 U.S. 949 (1963). *See also United Steelworkers of America v. Enterprise Wheel & Car Corp.*, *supra*, 363 U.S. at 598-99. Where the parties have bargained for an arbitrator's construction of their contract, a court will not overrule the arbitrator simply because its interpretation of the contract differs from his. Thus, a court enforces the contract of the parties who have agreed to abide by the arbitrator's decision.

Nevertheless, the purpose of federal arbitration law is "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). "It is no less true in suits brought . . . to enforce arbitration

awards than in other lawsuits that the 'power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States.' " *Local 453, International Unio nof Electrical, Radio & Machine Workers v. Otis Elevator Co.*, 314 F.2d 25, 29 (2d Cir.), *cert. denied*, 373 U.S. 949 (1963), *quoting Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948).

It is a general principle of contract law that courts will not enforce contracts requiring the performance of an illegal act. *Northwest Airlines, Inc. v. Alaska Airlines, Inc.*, 351 F.2d 253, 256 (9th Cir. 1965); *Naseef v. Cord, Inc.*, 90 N.J. Super. 135, ——, 216 A.2d 413, 417, *aff'd*, 48 N.J. 317, 225 A.2d 343 (1966). This principle applies to all kinds of contracts, including contracts under which parties agree to submit their grievances to arbitration and to abide by arbitrators' decisions. *See Amalgamated Transit Union v. Aztec Bus Lines*, 654 F.2d 692 (9th Cir. 1981) (arbitration award requiring a party to violate the law is against public policy and cannot be enforced); *Glendale Manufacturing Co. v. Local No. 520, International Ladies' Garment Workers' Union*, 283 F.2d 936 (4th Cir. 1980), *cert. denied*, 366 U.S. 950 (1961) (employer canot be forced to comply with an arbitration award requiring the commission of an unfair labor practice). *See also Minkoff v. Scranton Frocks, Inc.*, 181 F. Supp. 542, 547 (S.D.N.Y.), *aff'd*, 279 F.2d 115 (1960); *Rushton v. Howard Sober, Inc.*, 198 F. Supp. 337, 345 (W.D. Mich. 1961). We therefore conclude that the courts cannot enforce an arbitrator's award if it requires the performance of an illegal act.

We have determined that reinstatement of Murphy by the Postal Service would violate 5 U.S.C. § 7311. The district judge properly denied enforcement of the arbitrator's award and properly dismissed with prejudice the complaint to confirm the arbitration award.

AFFIRMED.

PREGERSON, Circuit Judge (dissenting):

I respectfully dissent. Remand to the arbitrator for clarification of his opinion is the proper course to follow here.

The majority first argues that a remand is unnecessary because "[t]he only logical inference which can be drawn" from the language of the arbitrator's opinion is that the arbitrator found Murphy to have "participated" in the unlawful strike. Maj. Op. at 4. It then contends that even if it is not clear that the arbitrator drew this conclusion, remand is still inappropriate because the facts admit of no contrary conclusion. Neither of these claims is justified.

I

According to the majority, the arbitrator ordered Murphy reinstated solely because he believed mitigating factors made dismissal an overly harsh penalty, and not because of any doubt as to whether Murphy participated in the strike. Yet the arbitrator's opinion nowhere states a finding of participation by Murphy. The language that the majority reads as implying such a finding does not, in fact, compel any such conclusion.[1] Indeed, the arbitrator's finding that Murphy was fired without just cause is evidence that the arbitrator concluded that Murphy had

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[1] Thus, the majority seizes on the arbitrator's statement that Murphy gave "active, but misconceived, support of the strike." Yet *support* for a strike quite obviously does not entail *participation* in the strike, since even persons who are not employees of the struck concern can support the strike (e.g., by refusing to cross picket lines or donating money to the strikers). The majority also points to the arbitrator's determination that Murphy "abandoned the strike" after learning it was not authorized by his union. This, too, does not necessarily imply that Murphy initially "participated" in the strike. Had Murphy merely attended a meeting to discuss a proposed strike, and then decided not to take part in it, one could correctly say that he had "abandoned the strike" but not that he had ever "participated" in it.

not participated in the strike.[2] So is the language in which the arbitrator couched his conclusion: "the Arbitrator is neither constrained nor persuaded to uphold the termination." This language can most plausibly be interpreted as indicating that the arbitrator believed, not merely that mitgating factors counselled against upholding Murphy's discharge—so that the arbitrator was not "persuaded" to uphold it—but that Murphy had not violated 5 U.S.C. § 7311 by participating in the strike—so that the arbitrator was not "constrained" to uphold the discharge.

At best, therefore, the arbitrator's opinion is ambiguous on the crucial issue—whether Murphy participated in the strike. That ambiguity calls for a remand to the arbitrator to permit him to clarify his opinion, as both this circuit[3] and others[4] have recognized. Yet the majority not only refuses to seek such clarification, but chooses precisely that interpretation of the arbitrator's ambiguous opinion which renders the award unenforceable. That procedure directly contradicts our recognition that "[t]he Supreme Court . . . has consistently required us to favor the arbitrator's decision when his opinion is subject to

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[2] To conclude, despite this evidence, that the arbitrator believed Murphy had participated in the strike is to impute to the arbitrator either an inexplicable failure to realize that, by virtue of 5 U.S.C. § 7311, striking was "just cause" for dismissal, or a conscious desire to flout the law.

[3] *Hanford Atomic Metal Trades Council v. General Electric Co.*, 353 F.2d 302, 307-08 (9th Cir. 1965).

[4] *Burkart Randall v. Lodge 1076, IAM*, 648 F.2d 462, 468 (7th Cir. 1981); *Bell Aerospace Co. v. Local 516, UAW*, 500 F.2d 921, 924 (2nd Cir. 1974); *San Antonio Newspaper Guild Local 25 v. San Antonio Light Division*, 481 F.2d 821, 825 (5th Cir. 1973); *IBEW Local 369 v. Olin Corp.*, 471 F.2d 468, 472-73 (6th Cir. 1972); *Local 719, American Bakery & Confectionery Workers v. National Biscuit Co.*, 378 F.2d 918, 926 (3rd Cir. 1967); *cf. Locals 2222, 2320-2327, IBEW v. New England Telephone & Telegraph Co.*, 628 F.2d 644, 647-49 (1st Cir. 1980) (dispute not reached in arbitration proceeding, but encompassed within original submittal, requires remand to original arbitrators).

several interpretations." *IAM Local 389 v. San Diego Marine Construction Corp.*, 620 F.2d 736, 739 (9th Cir. 1980).[5]

A remand would give the arbitrator the opportunity to clear up the confusion generated by the conflicting interpretations to which his opinion is subject. Possibly he would explain that—as the majority believes—he meant to find that Murphy had participated in the illegal strike. In that case, Murphy's discharge could be upheld; the government would scarcely be significantly prejudiced by the delay. Possibly, however, the arbitrator would explain that in his opinion Murphy did not "participate" in the strike. There would then be no justification for firing Murphy; the order reinstating him would be valid and enforceable, and he would be spared the stigma of discharge and disqualification from federal employment. That, indeed, was what happened in a case squarely on point, *United States Postal Service v. National Post Office Mail Handlers Union*, Civil No. 79-1967 (D.N.J. April 3, 1980). That case, like the one before us, involved a postal employee, discharged for alleged participation in an illegal strike, whose reinstatement was ordered by an arbitrator. The arbitrator's opinion contained greater evidence of strike participation than does the opinion in the instant case—in fact, it explicitly labeled the discharged worker a "participant in the strike." Yet, because the arbitrator had also found the employee's discharge to be without just cause, the district court perceived an ambiguity in the arbitrator's opinion and remanded for clarification. The arbitrator explained that he had not meant to find that the worker had "participated" in the strike for purposes of applying 5 U.S.C.

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[5] The Supreme Court has cautioned that "[a] mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960). *See also In re Arbitration Between Aloha Motors, Inc. and ILWU Local 142*, 530 F.2d 848, 849 (9th Cir. 1976).

§ 7311, and the district court then upheld the award ordering reinstatement. I can perceive no reason why the remand procedure adopted by the district court in the New Jersey case is not equally appropriate here.

II

The majority, however, argues that a remand is inappropriate here even if the arbitrator's opinion is ambiguous. According to the majority, it is so clear that Murphy participated in the strike that a contrary finding on remand would constitute "manifest disregard of the law" by the arbitrator and would thus merit no judicial deference.

The majority's appeal to the principle that "manifest disregard of the law" invalidates an arbitrator's decision is surprising. I have found not a single case in which this circuit has ever applied that principle to overturn an arbitration award.[6] Indeed, we have indicated that it is difficult even to understand just what "manifest disregard of the law" means. *San Martine Compania de Navigacion v. Sanguenay Terminals Ltd.*, 293 F.2d 796, 801 n.4 (9th Cir. 1961). At the very least, it "must be something beyond and different from a mere error in the law or failure on the part of the arbitrator to under-

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[6] Significantly, when the majority declares that "a conclusion that Murphy did not strike would constitute manifest disregard for the law," Maj. Op. at ——, it cites four cases notable chiefly for their irrelevance. *Wilko v. Swan*, 346 U.S. 427 (1953); *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2d Cir. 1972); *Trafalgar Shipping Co. v. International Milling Co.*, 401 F.2d 568 (2d Cir. 1968); *San Martine Compania de Navigacion v. Saguenay Terminals Ltd.*, 293 F.2d 796 (9th Cir. 1961). In none of these cases was an arbitration award set aside for manifest disregard of the law (or for any other reason). Moreover, none of these cases arose in a labor context, in which extreme deference to an arbitrator's decisions is mandated. *See United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960); *Riverboat Casino, Inc. v. Local Joint Executive Board*, 578 F.2d 250, 251 (9th Cir. 1978); *Holly Sugar Corp. v. Distillery Workers Int'l Union*, 412 F.2d 899, 902-03 (9th Cir. 1969).

stand or apply the law," *id.* at 801, since "[i]t is a truism that an arbitration award will not be vacated for a mistaken interpretation of law." *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2d Cir. 1972); *accord, Raytheon Co. v. Rheem Mfg. Co.*, 322 F.2d 173, 182 (9th Cir. 1963).[7] Since it is so difficult to determine what "manifest disregard" means, and since whatever it is must transcend misinterpretation or misapplication of the law, it is astonishing that the majority can confidently assert that only through "manifest disregard of the law" could the arbitrator conclude that Murphy did not participate in the strike.

In fact, however, the majority does not rest on this assertion. Even if a finding of non-participation would not constitute manifest disregard of the law, we are told, such a finding would still deserve no judicial deference. For—and here at last we have the crux of the majority's opinion—"[w]e cannot empower the arbitrator to nullify the mandates of Congress simply by stating that an individual did not strike when, as here, his actions, as presented in undisputed facts, constitute a strike." Maj. Op. at ——.

The majority's basic position, then, is not that the arbitrator unambiguously found Murphy to have participated in the strike, nor that a contrary conclusion would require "manifest disregard of the law." It is, quite simply, that the majority has assumed the role of deciding whether Murphy participated in the strike, and has decided that he did. With all due respect, it is for the arbitrator, not this court, to make that decision. Consequently, I must dissent from the unwarranted and unjust disposition which the majority arrives at in this case.

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[7] At least one court has stated that manifest disregard can be shown only by establishing that the arbitrator understood and correctly stated the law and then proceeded to ignore it. *Reynolds Securities, Inc. v. Macquown*, 459 F. Supp. 943, 945 (W.D. Pa. 1978).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-80-0748-WWS

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Plaintiff,

v.

UNITED STATES POSTAL SERVICE,
SAN FRANCISCO BULK MAIL CENTER,
RICHMOND, CALIFORNIA,
Defendants.

[Filed April 11, 1980]

ORDER

This is an action by a Postal Worker's union which seeks to enforce an arbitration award in favor of one of those workers. The arbitrator found that the employee in question had engaged in an illegal strike against an agency of the United States but determined nonetheless that the striker should be allowed to return to his position.

The Postal Service has refused to comply with the arbitrator's award on the grounds that rehiring a striker is a violation of federal law. 5 U.S.C. 7311 prohibits the hiring of individuals who participate in a strike against the United States. The Court concludes that an arbitration award which compels the performance of an illegal act cannot be enforced. *Glendale Mfg. Co.* v. *Local 520 ILGWU*, 283 F.2d 936 (4th Cir. 1960), *cert. denied*, 366 U.S. 950 (1961). The Court has therefore determined that the award herein must be vacated. *Sobel* v. *Hertz, Werner & Co.*, 469 F.2d 1211, 1215 (2nd Cir. 1972).

IT IS ORDERED that the award of Arbitrator William E. Rentfro entered December 31, 1979 in favor of

Michael Murphy be denied enforcement, and is vacated; the action is dismissed.

DATED: 7/11/80

/s/ William W. Schwarzer
United States District Judge

"EXHIBIT 2"

Removal of Michael Murphy

Case No. AC-W-28, 334-D

IN THE MATTER OF AN ARBITRATION

Between

UNITED STATES POSTAL SERVICE,
SAN FRANCISCO BULK MAIL CENTER,
RICHMOND, CALIFORNIA

And

AMERICAN POSTAL WORKERS UNION, AFL-CIO

December 31, 1979

AWARD OF THE ARBITRATOR

This matter came on for hearing on June 21, 1979, at the San Francisco Bulk Mail Center in Richmond, California before Arbitrator William E. Rentfro, selected by the parties to hear and render a final decision on the issue in dispute.

The Union was represented by Stewart Weinberg, Esq., of the firm of Van Bourg, Allen, Weinberg & Roger. The Postal Service was represented by John H. Arbuckle, Esq., Regional Labor Counsel.

By agreement of the parties, the matter was argued orally following presentation of evidence. A Letter Award was issued by the Arbitrator on October 4, 1979.

THE ISSUE

Was the Grievant, Michael Murphy, discharged for just cause? If not, what is the appropriate remedy?

STATEMENT OF THE CASE

Grievant was first employed by the Postal Service on August 27, 1977, at the Terminal Annex in Seattle, Washington. In June 1978, he obtained a position at the San Francisco Bulk Mail Center (BMC). He was served with a Notice of Removal on July 27, 1978, which alleged that he had engaged in an unlawful work stoppage against the Service, and, more specifically, that he had picketed at an entrance to the BMC during his scheduled work hours on July 22, 1978.

The only witness at the hearing, Grievant testified that he had been scheduled to work on Saturday, July 22, 1978. He was aware that contract negotiations between the Postal Workers Union and the Service were in progress and that there had been discussions among his fellow employees regarding a possible strike. On Friday evening, in fact, Grievant received a telephone call from a male individual whose name Grievant recognized. The caller informed Grievant there would be a strike at the facility the following morning and requested Grievant's support. Grievant replied that he would be at the Center in the morning.

Although his shift did not begin until 9:00 a.m., Grievant arrived outside the facility at approximately 7:45 a.m. on Saturday morning. He intended to investigate the situation before he "made any decisions" regarding the strike.

He observed some thirty people on the corner of Central Avenue and Rydin Road. The group had picket signs and appeared to be moving toward the facility's main entrance. Grievant recognized certain individuals with whom he worked and also persons whom he knew to be union officers.

Grievant approached the pickets and inquired about the activities. He was told that a picket line would be established, but that no one would be physically restrained

from crossing it. Grievant anticipated that there would be threats and verbal abuse directed toward workers crossing the line. Moreover, he concluded that he would not attempt to enter the facility for fear of future reprisal.

Following his observations, Grievant drove to a public telephone and called the BMC. He stated that he would not report for duty as he was afraid to cross the picket line. He then returned to the main gate and commenced picketing. Grievant testified that he had two significant reasons for joining the pickets: "I felt safer by not crossing the line. And secondly, I was one of them because I was in their union, worked with them."

Grievant engaged in picketing activities until 10:30 or 11:00 a.m. He then left the area for a period of time.

Later that afternoon, Grievant again returned to the picket line. He spoke with several of his fellow workers and discovered—contrary to his previous belief—that the union leadership had neither initiated nor approved the strike. As the strike had not been sanctioned, Grievant decided that he would not offer further support to the work stoppage.

On the three following days, Grievant testified, he came to the Center prior to the start of his scheduled shift. He called in each successive day to report that he was unwilling to cross the picket line. He then returned home without taking part in picketing activity.

Grievant also attempted to determine whether or not he had been discharged, but was unable to do so. On Thursday, July 27, he received formal notice of his termination.

On cross-examination, Grievant stated that he had observed letters distributed by the Postal Service management to the effect that strikes by postal employees were prohibited under law. He nevertheless initially believed the strike had been called at the national level. He re-

solved the apparent conflict by joining his fellow employees on the picket line until he was informed that the union in fact did not authorize the activity.

Grievant also testified that he was twenty-one years of age and had had no significant employment experience prior to entering the Service. His work record with the Service contained no previous disciplinary action.

DISCUSSION AND CONCLUSIONS

The cases arising from the work stoppages at the Bulk Mail Centers in Richmond and Jersey City have resulted in a variety of arbitral decisions concerning discharged employees. The broader legal issues pertaining generally to all cases have been treated at length by this Arbitrator and others. It is fairly settled, at least among the respective arbitrators, that each case is to be evaluated on its own merits with reference to the intentions of the alleged striker, the nature and extent of his or her participation, the effects of that participation, and any unique circumstances tending to mitigation. Examination of cases on such an individualized basis necessarily involves resolutions of credibility, assessments of motive, and other factors of a highly intangible nature.

There is no factual dispute regarding Grievant's conduct. It was alleged, and Grievant admits, that he picketed at the entrance to the facility on the morning of July 22, 1978. The evidence is uncontroverted that Grievant thereafter abandoned the strike and took no further part in proscribed activities. Does the active, but misconceived, support of the strike for a relatively short time demand the ultimate penalty here? The Arbitrator thinks not.

Counsel for the Service characterizes Grievant's case as "one of the most unfortunate cases that we have had before us because of his age and short term of service and so forth." The Union likewise emphasizes Grievant's

youth and susceptibility to the influence of his co-workers, and his lack of experience in labor disputes. Those considerations, in the Arbitrator's opinion, are legitimate and appropriate ones.

Grievant's assertions that he acted under erroneous assumptions and that he subsequently abandoned the strike are convincing. The penalty of discharge is too severe in view of Grievant's potential for becoming a valuable Postal Service employee, and particularly in view of the destructive effect that sustaining the discharge would in all likelihood have upon his prospects for future employment. Given the mitigating circumstances present here, the Arbitrator is neither constrained nor persuaded to uphold the termination.

AWARD

The Grievant, Michael Murphy, was not discharged for just cause. He shall be reinstated with no loss of seniority rights, but without back pay.

/s/ William E. Rentfro
WILLIAM E. RENTFRO
Arbitrator

Supreme Court, U.S.
FILED
JAN 10 1983
ALEXANDER L. STEVAS
CLERK

No. 82-575

In the Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
PETITIONER

v.

UNITED STATES POSTAL SERVICE, SAN FRANCISCO BULK MAIL CENTER, RICHMOND, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly refused to enforce an arbitration award requiring the Postal Service to reinstate an employee found by the court to have engaged in a strike against the Service, on the ground that the award was inconsistent with 5 U.S.C. 7311, which prohibits an individual from holding "a position in the Government of the United States * * * if he * * * participates in a strike" against the United States.

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In the Supreme Court of the United States

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No. 82-575

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PETITIONER

v.

UNITED STATES POSTAL SERVICE, SAN FRANCISCO BULK MAIL CENTER, RICHMOND, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 682 F.2d 1280. The order of the district court (Pet. App. 15a-16a) and the award of the arbitrator (Pet. App. 17a-21a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1982. On August 31, 1982, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to October 1, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 21, 1978, Michael Murphy, a postal employee at the bulk mail facility of the United States Postal Service located in Richmond, California, was informed that a strike

was planned for the bulk mail center the following day (Pet. App. 2a). He arrived at the facility the next morning and observed a group of co-workers and union officers establishing a picket line at the main entrance. Although Murphy was advised that "no one would be prevented from crossing" the line (*ibid.*), he nonetheless feared verbal abuse and possible future reprisals, and so telephoned his superiors to tell them that he would not violate the picket line (*id.* at 19a). Instead of returning home, however, Murphy joined the picket line for about an hour because he "was in their union." *Id.* at 2a. Murphy then learned that the strike was not sanctioned by the national union, and thereafter declined to participate further on the picket line. Nevertheless, Murphy called in and reported that he was unwilling to cross the line on the next three work days. On July 27, 1982, Murphy received formal notice of the termination of his employment with the Postal Service (*id.* at 3a).

Petitioner, the collective bargaining agent for federal postal clerks, processed Murphy's grievance to arbitration under the collective bargaining agreement with the Postal Service, claiming that Murphy was discharged without "just cause" (Pet. App. 17a). See 39 U.S.C. 1206.[1] After a

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[1]Postal workers are in the postal career service, which is part of the civil service. 39 U.S.C. 1001(b). See also 39 U.S.C. 201. Generally speaking, most federal employees represented by a bargaining representative may choose to have their discharges reviewed either under the grievance and arbitration provisions of the collective bargaining agreement or by the Merit Systems Protection Board (MSPB). 5 U.S.C. (Supp. V) 7121(e)(1) and 7512. Employees of the Postal Service, on the other hand, have the option of proceeding before the MSPB only if they are "preference eligible" employees. 5 U.S.C. (Supp. V) 7511(a)(1)(B). In other respects, employees of the Postal Service are placed under the jurisdiction of the National Labor Relations Act (39 U.S.C. (& Supp. V) 410(b)(1) and (b)(2)), subject to the exception that they, like other federal employees, are prohibited from resorting to strikes as a means of resolving bargaining disputes (39 U.S.C. (Supp. V) 410(b)(1)). See generally *United Federation of Postal Clerks* v. *Blount*, 325 F. Supp.

hearing, the arbitrator issued a letter award on October 4, 1979, which was followed on December 31, 1979, by a decision and award (Pet. App. 17a-21a). The arbitrator found that Murphy picketed on July 22, 1978, and failed to report for his next three scheduled shifts because he was "unwilling to cross the picket line," and further found that Murphy had "observed letters distributed by the Postal Service management to the effect that strikes by postal employees were prohibited under law" (Pet. App. 19a). Although Murphy did "support * * * the strike" (*id.* at 20a), the arbitrator nevertheless ordered him reinstated without back pay, because the short duration of Murphy's picketing, coupled with his youth, militated against the imposition of the ultimate penalty of discharge (*id.* at 20a-21a).

2. When the Postal Service refused to reinstate Murphy, petitioner filed suit pursuant to 39 U.S.C. 1208(b) in the United States District Court for the Northern District of California to enforce the arbitration award. The district court denied enforcement of the award (Pet. App. 15a-16a). The court held that 5 U.S.C. 7311[2] prohibits the retention of an employee who strikes against the government, and "an arbitration award which compels the performance of an illegal act cannot be enforced" (Pet. App. 15a).

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879 (D.D.C.), aff'd, 404 U.S. 802 (1971); *United States* v. *Branch 60, National Association of Letter Carriers*, 312 F. Supp. 619 (D. Conn. 1970).

[2]5 U.S.C. 7311 provides that "[a]n individual may not accept or hold a position in the Government of the United States * * * if he * * * (3) participates in a strike * * * against the Government of the United States * * *." Violations of this section are punishable by a fine of up to $1,000 and imprisonment for a term not to exceed one year and one day (18 U.S.C. 1918(3)).

3. The court of appeals affirmed, by a vote of 2-1 (Pet. App. 1a-14a). The court of appeals initially found that the evidence could support only a finding that Murphy had joined the strike. Indeed, the court inferred that the arbitrator himself found that Murphy had engaged in prohibited strike activity from the arbitrator's statement that Murphy gave the strike his "active * * * support" and the arbitrator's refusal to grant Murphy back pay (*id.* at 4a, 5a). The court alternatively held that regardless of the arbitrator's intention, any conclusion that Murphy did not participate in the strike would constitute a "manifest disregard of the law" in view of Murphy's own uncontroverted testimony (*id.* at 6a).

Having found that Murphy had engaged in an illegal strike under 5 U.S.C. 7311, the court of appeals held (Pet. App. 9a) that the arbitration award reinstating Murphy would require "the performance [by the Postal Service] of an illegal act." Accordingly, the court concluded that the award could not be enforced under settled principles of judicial review of arbitration awards.[3]

ARGUMENT

1. Petitioner contends (Pet. 7-10) that the decision of the court of appeals inadequately deferred to the award of the arbitrator as required by prior decisions of this Court.[4] Contrary to petitioner's assertion, however, arbitration awards are not absolutely immune from judicial review, but must be vacated when they conflict with federal law.

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[3]Judge Pregerson dissented. He concluded that the arbitrator's award was ambiguous as to whether Murphy had participated in the strike and that the matter should be remanded to the arbitrator to permit clarification on this question (Pet. App. 10a-11a).

[4]Specifically, petitioner relies upon *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Accordingly, the decision of the court of appeals is consistent with this Court's prior decisions and does not warrant further review.

An arbitrator "does not sit to dispense his own brand of industrial justice," and the "courts have no choice but to refuse enforcement" of awards that exceed the arbitrator's limited authority to interpret and apply the collective bargaining agreement. *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). At bottom, "[t]he power of the federal courts to enforce the terms of private [arbitration] agreements is at all times exercised subject to the restrictions and limitations of public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents." *Hurd* v. *Hodge*, 334 U.S. 24, 34-35 (1948). See *International Brotherhood of Teamsters* v. *Washington Employers, Inc.*, 557 F.2d 1345, 1350 (9th Cir. 1977); *Local 453, International Union of Electrical Workers* v. *Otis Elevator Co.*, 314 F.2d 25, 29 (2d Cir.) (Marshall, J.), cert. denied, 373 U.S. 949 (1963). Based on these settled principles, the courts of appeals have routinely refused enforcement of two related categories of arbitration awards: those requiring the complying party to violate the law,[5] and those that are plainly contrary to a recognized public policy.[6] The decision

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[5]See, *e.g.*, *General Warehousemen & Helpers Local 767* v. *Standard Brands, Inc.*, 579 F.2d 1282, 1293 (5th Cir. 1978) (en banc), cert. dismissed, 441 U.S. 957 (1979); *Banyard* v. *NLRB*, 505 F.2d 342 (D.C. Cir. 1974); *Associated Milk Dealers, Inc.* v. *Milk Drivers Local 753*, 422 F.2d 546, 552-553 (7th Cir. 1970); *Glendale Manufacturing Co.* v. *Local No. 520, International Ladies' Garment Workers Union*, 283 F.2d 936, 940 (4th Cir. 1960), cert. denied, 366 U.S. 950 (1961); *Evans* v. *Hudson Coal Co.*, 165 F.2d 970 (3d Cir. 1948).

[6]See, *e.g.*, *Local No. P-1236, Amalgamated Meat Cutters & Butcher Workmen* v. *Jones Dairy Farm*, 680 F.2d 1142 (7th Cir. 1982); *Johns-Manville Sales Corp.* v. *International Association of Machinists, Local Lodge 1609*, 621 F.2d 756, 759 (5th Cir. 1980); *Truck Drivers Local Union No. 807* v. *Bohack Corp.*, 541 F.2d 312 (2d Cir. 1976).

below conforms to these established principles, since the order to reinstate an employee found to have participated in a strike against the government would have required the Postal Service to act in contravention of the mandate of 5 U.S.C. 7311.

That statute unequivocally states that "[a]n individual may not accept or hold a position in the Government of the United States * * * if he * * * (3) participates in a strike * * * against the Government of the United States * * *." As the court below correctly concluded, the arbitrator's order to reinstate Murphy would have required the Postal Service to continue to employ a proven strike participant. Not only is this result contrary to the plain meaning of the statute, but also it is clearly repugnant to the strong public policy against strikes by federal employees — a policy that is embodied in Section 7311 and its predecessors and is the basis for a panoply of civil and criminal anti-strike legislation.[7]

The arbitrator in this case simply rendered an independent policy determination that the sanction for striking ought to be less stringent than discharge if mitigating circumstances can be demonstrated. But as the court of appeals correctly held: "The choice of sanctions * * * is not arbitrable; that choice has already been made by Congress" (Pet. App. 7a).[8]

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[7]Indeed, the policy commitment against strike participation by federal employees is so firm that Congress has branded the violation of 5 U.S.C. 7311 a felony (see 18 U.S.C. 1918) and has redefined the term "federal employee" in the Civil Service Reform Act explicitly to exclude strike participants. 5 U.S.C. (Supp. V) 7103(a)(2)(B)(v). See also *United States* v. *PATCO*, 653 F.2d 1134, 1138-1139 (7th Cir. 1981).

[8]There is no basis for petitioner's claim (Pet. 9) that the decision of the court below conflicts with *Boire* v. *International Brotherhood of Teamsters*, 479 F.2d 778, 803 (5th Cir. 1973), and *NLRB* v. *Horn & Hardart Co.*, 439 F.2d 674, 678 (2d Cir. 1971). Petitioner quotes

Petitioner suggests (Pet. 9-10) that this case raises issues akin to those presented in *W. R. Grace & Co.* v. *Local Union No. 759, International Union of Rubber, Cork, Linoleum & Plastic Workers*, No. 81-1314 (cert. granted, June 28, 1982). But the proper disposition of this case is in no way contingent on the outcome of that case. In *W. R. Grace*, an arbitrator refused to grant back pay to white employees who had been laid off ahead of minority employees, because the layoffs had been conducted pursuant to a Title VII (42 U.S.C. 2000e, *et seq.*) conciliation agreement negotiated by the Equal Employment Opportunity Commission. However, a second arbitrator granted back pay to other white employees, and that award ultimately was upheld by the court of appeals.

The first two issues presented in *W. R. Grace* deal with the validity and effect of the first arbitrator's award and have nothing to do with this case. Only if the Court holds against the company on those issues will it even be required to consider whether the second arbitral award is repugnant to the public policy favoring settlement of Title VII litigation. But there is no dispute in *W. R. Grace* as to whether an award that violates federal law or public policy is unenforceable; the only issue is whether the Title VII policy favoring settlements is sufficiently compelling to warrant setting aside the decision of the arbitrator. The public policy

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isolated passages from those cases to the effect that an arbitrator must look only to the four corners of the collective bargaining agreement, and suggests on the basis of that proposition that an arbitrator's decision must be enforced without regard to the contrary dictates of external law. But *Boire* and *Horn & Hardart* held exactly the opposite. In both cases, the NLRB had refused to defer to arbitral awards that were in conflict with the representational requirements of the NLRA. In each case, the court recognized that the NLRB had primary authority to interpret and apply the NLRA and refused to honor the awards precisely because they were in violation of federal statutes that the arbitrators were not equipped or required to construe.

embodied in Section 7311 against reinstating federal employees who strike against the government has been declared by Congress with unmistakable clarity and compels the result reached by the court of appeals. Moreover, while the arbitrator's award in *W. R. Grace* may not itself have violated Title VII, the arbitrator's award in this case is plainly contrary to Section 7311. Thus, even if this Court in *W. R. Grace* rejects Title VII conciliation policy as sufficient to warrant vacating the arbitrator's award, it would in no way undermine the validity of the decision below, which is based on a wholly different statutory scheme and purpose.

2. Petitioner contends (Pet. 10-11) that the rule barring enforcement of arbitral awards that contravene federal law may be avoided here because the arbitrator's decision can be construed to support the conclusion that Murphy did not participate in the strike. Petitioner asserts that the decision below, which declined to interpret the arbitrator's award as ambiguous, conflicts with the principle that a reviewing court must uphold an arbitral award if it is susceptible to an interpretation that does not place it at odds with prevailing law and public policy (Pet. 10-11).[9]

There is no conflict here. The court of appeals found that the arbitration award was susceptible to only one conclusion—that Murphy had participated in the strike. That factual determination is fully supported by a plain reading of the arbitrator's decision, which described Murphy as having supported the strike and which refused to grant Murphy back pay. Moreover, in light of Murphy's own statements, the court held that any finding that Murphy did not engage in the strike would have required a manifest

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[9]See, *e.g.*, *NLRB* v. *Pincus Brothers, Inc.-Maxwell*, 620 F.2d 367 (3d Cir. 1980); *Douglas Aircraft Co.* v. *NLRB*, 609 F.2d 352, 354 (9th Cir. 1979).

disregard of the law. The court of appeals' reading of the arbitrator's decision does not warrant review by this Court.

3. Finally, petitioner argues (Pet. 11-12) that the arbitrator's award does not violate federal law or policy because 5 U.S.C. 7311 does not absolutely prohibit the Postal Service from retaining an employee found to have participated in a strike. In support of this argument, petitioner relies on statements in *United States* v. *PATCO*, 653 F.2d 1134, 1141 (7th Cir. 1981), and *United States* v. *PATCO*, 438 F.2d 79, 82 (2d Cir. 1970), to the effect that the United States might not be required to terminate or to prosecute criminally all air traffic controllers who participated in certain work slow-downs. This argument is without merit.

First, petitioner never argued below that the discharge of a striker was not anticipated by 5 U.S.C. 7311. The majority observed that there was no controversy over this question (Pet. App. 3a-4a), and even the dissent assumed that Section 7311 requires an arbitrator to uphold the dismissal of an employee found to have participated in a strike against the United States (Pet. App. 11a & n.2). Because it was neither raised nor considered below, petitioner's contention that Section 7311 does not require the discharge of a proven striker was not properly preserved for review by this Court. See *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, there is no inconsistency between the decision below and the statements in the two *PATCO* cases. The question decided in both of those cases was whether 5 U.S.C. 7311 provides a basis for an anti-strike injunction. Even if those cases had squarely held that the United States is not required to seek the discharge of every employee who is alleged to have participated in prohibited strike activity—which would be tantamount to a determination that the United States has prosecutorial discretion whether or not to invoke 5 U.S.C. 7311 and 18 U.S.C. 1918—they would still

not mean that a federal court is entitled to disregard the statute in reviewing an arbitrator's decision to reinstate an employee against whom the government has invoked its statutory authority to discharge, and who is found in the arbitration proceeding to have engaged in a strike. Since the decision below conflicts with no decision of this Court or any other court of appeals, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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